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No. 75-1593

In the Supreme Court of the United States

OCTOBER TERM, 1976

STUART ALLEN PERKAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 530 F. 2d 604.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1976. A petition for rehearing was denied on March 1, 1976. The Chief Justice extended the time for filing a petition for a writ of certiorari to April 30, 1976, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence of petitioner's participation in a fraudulent scheme is sufficient to support his convictions under the mail fraud statute.

STATEMENT

After a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of 46 counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to concurrent five-year terms of imprisonment, and fined $1,000 on each count. The court of appeals affirmed the convictions on 37 counts and remanded for a correction of judgment and sentencing on the remaining counts, some of which, the court held, had merged (thus reducing the total fine) because they did not charge separate mailings (Pet. App. A).

The facts are set forth in the court of appeals' opinion and in the petition for certiorari (Pet. 4-11; Pet. App. 2a). Petitioner, a medical doctor most of whose patients were personal injury claimants referred to him by lawyers, participated with seven lawyers[1] in a scheme (or several schemes)[2] over a three-year period to defraud eight insurance companies of large sums of money, paid in settlement of negligence claims arising out of automobile accidents. Petitioner rendered inflated bills for alleged medical treatment of patients sent to him by the lawyers. The lawyers sent the bills to the insurance companies, usually by mail. The insurance companies sent checks to the lawyers in payment of the accident claims, the proceeds of which the lawyers shared with petitioner. Petitioner knew that the mails were usually used in the submission of claims to and receipt of payment from the insurance companies (Pet. 10 n. 13, 11 n. 14). Each count on which

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[1]Two of these lawyers, Morris S. Berman and Stanley J. Bomstein, pleaded guilty to mail fraud and testified as government witnesses.

[2]Since there was no conspiracy count, it is of no moment whether there was a single scheme or, as petitioner claims (Pet. 8 and n. 8), several similar schemes, each involving petitioner and different attorneys.

petitioner was convicted related to a separate mailing made or caused to be made by the lawyers in furtherance of the fraudulent scheme; petitioner made no mailings.

ARGUMENT

1. Petitioner in effect concedes that there was a scheme to defraud the insurance companies in which he participated by "furnish[ing] the lawyer with an inflated medical bill and report" (Pet. 7, 9), and that the mailings for which he was convicted were made "in execution of the schemes to defraud" (Pet. 9), in violation of the mail fraud statute. He contends, however, that there was an insufficient connection between his activities and the mailings to justify his conviction, because a person who has not himself made the mailings violates the mail fraud statute only if he "'wished to bring about' the mailings" (Pet. 18), an element which he contends is lacking here. Petitioner's argument rests upon a misinterpretation of the statute and an erroneous view of the evidence.

The mail fraud statute (18 U.S.C. 1341) provides that "[w]hoever, having devised * * * any scheme * * * to defraud * * *, for the purpose of executing such scheme * * *, places in [the mails] * * *, or knowingly causes to be [mailed] * * *" any matter, is guilty of mail fraud. *Pereira* v. *United States*, 347 U.S. 1, held that to establish a violation of the statute "it is not necessary to show that [an individual] actually mailed or transported anything [himself]; it is sufficient if [he] caused it to be done" (*id.* at 8). The Court explained (*id.* at 8-9):

> Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he "causes" the mails to be used.

The court of appeals correctly held (Pet. App. 5a) that under this standard the evidence supports petitioner's convictions. The evidence showed that petitioner submitted fraudulent medical bills to the attorneys knowing that "most times they were mailed out" (see Pet. 11 n. 14) and that the mails were the "customary" means of receiving proceeds from the insurance companies (see Pet. 10 n. 13). Viewed in the light most favorable to the government (*Glasser* v. *United States*, 315 U.S. 60, 80), this evidence established that petitioner caused the mails to be used in furtherance of the fraudulent scheme. As the court of appeals said (Pet. App. 5a), it shows "that [petitioner] knew that the fraudulent bills and reports were likely to be mailed and that the use of the mails in the submission of those bills and reports could 'reasonably be foreseen.'" Indeed, since petitioner's profit from the scheme depended upon the payment of the inflated bills by the insurance companies, he obviously " 'wished to bring about' the mailings" which were part of the submission and collection of the bills.

2. Petitioner also challenges (Pet. 17-18) the instructions to the jury. The court told the jury (C.A. App. 76):[3]

> The use of the United States mails in furtherance of a scheme to defraud is, as I've indicated, an essential element of the offense charged. It is not necessary that * * * [petitioner] do any actual mailing, himself, or that he specifically intends that the mails be used. It is sufficient if the mails were in fact used to carry out the scheme, and if [petitioner] knew or could reasonably foresee that the mails would be used in furtherance of or as a consequence of the scheme.

The court further instructed the jury (C.A. App. 78-79): "And if upon consideration of any count in the indictment

[3]"C.A. App." refers to the appendix filed in the court of appeals.

you have a reasonable doubt that [petitioner] could foresee that the mailing would be made, * * * you should * * * acquit [petitioner] on the charge contained in that count." These instructions were proper under *Pereira* v. *United States, supra.*

The additional instructions (quoted at Pet. 12-13) concerning "aiding and abetting" under 18 U.S.C. 2 did not, as petitioner suggests (Pet. 18), provide an alternative theory under which petitioner could be convicted even though he could not have foreseen that the mailings would take place.[4] The court correctly explained 18 U.S.C. 2 to the jury (see Pet. 12) as encompassing "every person who wilfully participates in the commission of a crime against the laws * * * of the United States * * *." As quoted above, the court had previously explained that the "crime" referred to in its instructions required a foreseeable mailing. Thus, the aiding and abetting instruction merely underscored that, to be guilty of violating 18 U.S.C. 1341, petitioner did not himself have to mail the fraudulent bills. Cf. *Pereira* v. *United States, supra,* 347 U.S. at 8, 10 (in which this Court cited 18 U.S.C. 2 to support its holding that it is sufficient if the evidence shows the individual caused the mailing even though he did not actually do it).[5]

[4]Petitioner did not object to the instructions regarding aiding and abetting, as he was required to do under Fed. R. Crim. P. 30.

[5]Petitioner contends (Pet. 15) that the court of appeals' opinion in effect eliminates the intent requirement for causing use of the mails. However, he relies upon an out-of-context quotation from the opinion (see Pet. App. 3a). The court's statement which he quotes—that "anyone who 'knowingly and intentionally' participates in the execution of the fraudulent scheme comes within the prohibition of the [mail fraud] statute"—was made in rejecting what the court perceived as petitioner's contention that the statute reached only "the actual originator of the scheme" (Pet. App. 3a). The court specifically held that intent regarding the use of the mails is required under the statute (Pet. App. 5a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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